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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Master File No. 3:07-md-05944-sc (N.D.Cal)
MDL No. 1917

This Document Related to:
Individual Case No. 3:13-cv-2171 (SC)
*Dell Inc.; Dell Products L.P., v. Philips
Electronics North America Corporation et al.,*
Individual Case No. 3:13-cv-01173-SC,
*Sharp Electronics Corp., et al. v. Hitachi, Ltd.,
et al.,*
Individual Case No. 3:13-cv-2776 SC,
*Sharp Electronics Corp., et al. v. Koninklijke
Philips Elecs., N.V. et al.,*

**DEFENDANTS' REPLY IN SUPPORT OF
JOINT MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST
DELL AND SHARP PLAINTIFFS ON
STATUTE OF LIMITATIONS GROUNDS
– Redacted**

Judge: Hon. Samuel Conti
Date: February 6, 2015
Time: 10:00 a.m.
Crtrm.: 1, 17th Floor

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1 **I. INTRODUCTION**

2 The evidence outlined in Defendants’ opening brief demonstrates that long before
3 November 27, 2003, Dell and Sharp knew or should have known the facts they allege in support of
4 their current claims.

5 From 1998 to 2003, dozens of internal Dell emails and documents reflect Dell’s

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 These contemporaneous documents render untenable Dell’s argument that it did not
15 discover, and could not have discovered, the alleged conspiracy until November 2007, when the
16 Department of Justice (DOJ) publicly announced an investigation. Dell seeks to minimize the
17 documentary record by arguing that, when its employees discussed a “cartel,” they did not mean to
18 refer to potential price fixing. *See* Dell Opp. at 13. This claim is foreclosed by the documents
19 themselves and contradicted by witness testimony.

20 Dell also asserts that because Dell witnesses testified that they did not know of or
21 suspect any collusion or cartels, that Dell therefore cannot have been on constructive notice of the
22 facts giving rise to the claims it now asserts. Dell’s own business records – [REDACTED]
23 [REDACTED] show clearly
24 that there were ample “red flags” that *should have* raised Dell’s suspicions and put Dell on
25 constructive notice. That some of these Dell employees now, years later, [REDACTED]
26 [REDACTED] is irrelevant to the inquiry of constructive notice. Finally,
27 Dell argues that Defendants fraudulently concealed the alleged conspiracy. But again the
28 documents show that Dell had actual and constructive knowledge of the alleged price-fixing

1 conspiracy. The evidence cited by Dell actually [REDACTED]
 2 [REDACTED]
 3 [REDACTED]

4 The Dell employees Dell claims were
 5 “diligently investigating” were not trying to ascertain the existence of potential collusion; rather,
 6 they clearly understood collusion to be a potential problem to Dell’s business and were trying to
 7 combat the problem or use that information to Dell’s advantage.

8 Sharp also asserts that it did not have any knowledge whatsoever regarding the
 9 alleged CRT conspiracy prior to the public announcement of the CRT investigation, Sharp points
 10 to no facts to support this position. The documents cited by the Defendants in the opening brief
 11 establish Sharp’s corporate knowledge. That Sharp can point to *certain employees* who deny
 12 knowledge does not rebut the documents. Sharp cannot create a genuine issue of material fact by
 13 citing two witnesses who testified that they themselves had no knowledge — or, more accurately,
 14 that they don’t recall having knowledge — when the documents stand as unrebutted evidence of
 15 Sharp’s corporate knowledge of information sufficient to prompt the inquiry of a reasonable
 16 person.

17 Sharp’s other arguments should also be rejected. First, remarkably, Sharp refers to
 18 a decision in the LCD case where Judge Illston denied summary judgment on statute-of-
 19 limitations grounds when the evidence — as Sharp now characterizes it — was “minimal.” *See*
 20 Sharp Opp. at 15-16. Sharp fails to mention that *Sharp itself* was one of the defendants that filed
 21 that unsuccessful summary judgment motion. In that briefing, Sharp argued that “a grand total of
 22 three Best Buy documents” was “unquestionably” sufficient to put one of Sharp’s now co-
 23 plaintiffs, Best Buy, on notice of a “panel cartel.” Declaration of Claire Yan in Support of
 24 Defendants’ Reply in Support of Joint Motion for Partial Summary Judgment Against Dell and
 25 Sharp Plaintiffs on Statute of Limitations Grounds (“Yan Suppl. Decl.”) Ex. 3 (Defendants’ Reply
 26 in Support of Joint Motion for Partial Summary Judgment Dismissing Best Buy’s (1) Pre-October
 27 8, 2006 Claims as Time Barred and (2) Post-May 2003 Claims for Failure to Mitigate Damages, *In*
 28

1 *re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-01827-SI (N.D. Cal. Sept. 14, 2012), ECF
2 No. 6748) at 2-3 (signed by Sharp, represented by the same counsel as here).¹

3 Second, Sharp's emphasis that documents cited as evidence of its knowledge of the
4 conspiracy were drafted by individuals from non-party Sharp Corporation, *see* Sharp Opp. at 2, 6,
5 7, is irrelevant in light of the facts surrounding the documents cited as evidence of Sharp's
6 knowledge and witness testimony that Sharp Corporation was involved in the procurement of
7 CRTs. In addition, this court has already found that the Sharp Plaintiffs' claims in this case are
8 based partly on its corporate relationship with Sharp Corporation.

9 Third, Sharp claims that its executives "testified unequivocally that they did not
10 suspect any unlawful concerted activity among defendants." Sharp Opp. at 3. Regarding one of
11 the specific documents at issue, however, Sharp only offers the testimony of a single executive
12 who did not have a specific recollection regarding the language suggesting Sharp's knowledge of
13 the alleged cartel.

14 Fourth, Sharp takes yet another inconsistent position when it argues that CRT
15 supply information that it received from one of the defendants likely came from a public source.
16 *See* Sharp Opp. at 13-14. Sharp makes this argument while simultaneously including that
17 information as evidence of anticompetitive behavior in its discovery responses. *See* Defs. Mot. at
18 15-16. Sharp cannot be allowed to take such inconsistent positions; either the evidence indicates
19 Sharp's knowledge of the conspiracy or it is public information which cannot be characterized as
20 allegedly anticompetitive competitor communication between defendants.

21 In sum, Dell and Sharp cannot establish the requirements for tolling under a
22 fraudulent concealment theory and Defendants' summary judgment motion should be granted.

23

24

25

26

27 ¹ For the avoidance of doubt, Plaintiff Sharp Electronics Corp. was one of the defendants who
28 moved for summary judgment. *Id.*

1 **II. ARGUMENT**

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 Dell argues that its employees were merely investigating possible price fixing and
17 were not expressing beliefs that price fixing [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] This is not mere “investigation,” as [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] that demonstrates a belief that cartel conduct is
25 *ongoing*, not a mere suspicion to be investigated. [REDACTED]

26 Further, even if this Court were to credit Dell’s strained interpretation of the term
27 “cartel,” [REDACTED]
28 [REDACTED]

1 [REDACTED]
 2 [REDACTED] These documents are not “ambiguous” as Dell
 3 claims. Dell Opp. at 10, 14-16. These contemporaneous emails [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 **B. Dell Had Sufficient Information To Be Put On Notice Of Its Claims**

12 As the documents show, Dell’s knowledge was not merely superficial. [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED] These communications clearly
 17 indicate that Dell, at a minimum, was on constructive notice of its claims. For there to be
 18 constructive knowledge, “[a]ny fact that should excite [a plaintiff’s] suspicion is the same as
 19 actual knowledge of his entire claim.” *Conmar Corp. vs. Mitsui & Co.*, 858 F.2d 499, 502 (9th
 20 Cir. 1988). As Defendants’ moving papers show, there were ample “red flags” in the documents
 21 that should have put Dell on notice of its claims. *See Hexcel Corp. v. Ineos Polymers, Inc.*, 681
 22 F.3d 1055, 1063 (9th Cir. 2012); *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 172 (4th
 23 Cir. 2007).

24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED] statement that a witness does not recall a
 28 particular incident is not the same as a statement that it did not happen. *Woodson v. Am. Med.*

1 *Ass'n*, No. 97 C 2169, 1998 WL 778075, at *3 (N.D. Ill. Nov. 2, 1998). Courts routinely hold that
 2 a party's lack of recollection cannot create a genuine issue of material fact in such circumstances.
 3 *See, e.g., Brown v. St. Paul Travelers Companies*, 331 Fed. Appx. 68, 70 (2nd Cir. 2009) ("We
 4 agree with the District Court that '[p]laintiff's statement, that she has no recollection or record of
 5 receiving the employee handbook and arbitration policy, despite the fact that it was distributed on
 6 at least six occasions during her employment, is ... not sufficient to raise a genuine issue of
 7 material fact.'"); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735–36 (7th Cir. 2002) (plaintiff's
 8 testimony that she "does not recall seeing or reviewing" a brochure "does not raise a genuine issue
 9 of material fact" in light of affidavits that the brochure was sent to her); *Dickey v. Baptist Mem'l*
 10 *Hosp.*, 146 F.3d 262, 266 n.1 (5th Cir. 1998) ("The mere fact that Dr. Washington does not
 11 remember the alleged phone conversation, however, is not enough, by itself, to create a genuine
 12 issue of material fact [as to whether it occurred.]"); *Robnett v. Blodgett*, No. 91-35397, 1992 WL
 13 280980, at *2 (9th Cir. 1992) ("A current lack of recollection" does not create a genuine issue of
 14 material fact, because "[a]bsence of proof is not proof of absence").

15 Dell does not and cannot dispute that these witnesses wrote and received these
 16 contemporaneous emails and business documents documenting and discussing possible collusion
 17 and cartel-like behavior. Nowhere in their opposition does Dell argue that the documents cited by
 18 Defendants lack authenticity. That Dell's witnesses cannot now, many years later, recall receiving
 19 these clear "red flags" is of no relevance to Dell's state of constructive knowledge at the time of
 20 those emails and documents. *See Hexcel*, 681 F.3d at 1063-64 (holding that district court, on
 21 summary judgment, did not err in rejecting declarations containing "general denials of Hexcel's
 22 knowledge of its claim"); *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) ("Conclusory
 23 allegations unsupported by factual data will not create a triable issue of fact" allowing a party to
 24 survive a summary judgment motion); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)
 25 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be
 26 insufficient.").

C. Evidence Does Not Indicate A Diligent Investigation By Dell As To The Existence Of A Conspiracy

Dell argues at length that Defendants sought to fraudulently conceal the alleged conspiracy. But the documentary record of Dell's knowledge demonstrates that Dell employees were on notice of sufficient facts to support Dell's claims. To establish fraudulent concealment, the plaintiff must not only show facts that defendant affirmatively misled it, but also that "the plaintiff had neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts." *Hexcel*, 681 F.3d at 1060. The "diligence" required is an effort to *uncover the facts behind plaintiff's claims*.

Contrary to Dell's assertion, the actual evidence cited by Dell and in Defendants' opening brief show that Dell employees clearly knew about and were very concerned with the [REDACTED] Dell's business. [REDACTED] [REDACTED] These "investigation efforts" were not efforts to investigate whether a "cartel" existed, but rather efforts by Dell's employees to counter the effects [REDACTED]

As noted in Defendants' moving papers, what Dell characterizes as efforts to investigate the existence of a cartel was actually Dell employees using their understanding and knowledge of how they perceived the cartel to operate to Dell's advantage, including trying to get lower prices for Dell. [REDACTED]

[REDACTED] These documents demonstrate that Dell was on sufficient notice of its claims to defeat any argument that the statute of limitations should be tolled based on alleged fraudulent concealment.

D. Sharp Takes The Position That "Three Pieces Of Paper" Is Insufficient To Establish Inquiry; Sharp Argued The Opposite In LCD

In arguing that the amount of evidence presented by the Defendants is insufficient to put Sharp on inquiry notice of the alleged CRT conspiracy, Sharp is taking a position directly opposite to the one it took in *LCD*.

1 In the Opposition, Sharp characterizes the “three pieces of paper” that Defendants
 2 cite as evidence as “scant,” “thin,” and “limited.” Sharp Opp. at 9, 15. In support, it cites to a
 3 decision in the *LCD* case where Sharp itself, among other defendants, moved for summary
 4 judgment on precisely the same grounds that the Defendants move here. *See id.* at 15-16. In the
 5 *LCD* case, the plaintiff was Sharp’s now co-plaintiff Best Buy. In its motion against Best Buy,
 6 Sharp argued that Best Buy had notice of the alleged *LCD* conspiracy three years before the *LCD*
 7 investigation became public based on “a grand total of three Best Buy documents” that refer to a
 8 “Panel Cartel.” Yan Suppl. Decl. Ex. 1 at 4-6. Sharp’s co-plaintiff, in that case, Best Buy, made
 9 the exact same argument in opposition that Sharp does here, claiming that a “single conclusory
 10 ‘panel cartel’ comment does not come close to establishing that Best Buy had actual knowledge of
 11 Defendants’ conspiracy.” Yan Suppl. Decl. Ex. 2 (Best Buy’s Opposition to Defendants’ Joint
 12 Motion for Partial Summary Judgment Dismissing Best Buy’s (1) Pre-October 8, 2006 Claims as
 13 Time Barred and (2) Post-May 2003 Claims for Failure to Mitigate Damages, *In re TFT-LCD*
 14 *(Flat Panel) Antitrust Litig.*, Case No. 3:07-md-01827-SI (N.D. Cal. Aug. 17, 2012), ECF No.
 15 6497) at 12. In reply, Sharp argued that “[t]here is no volume or quantity requirement applicable
 16 to the disclosure of information sufficient to put a plaintiff on notice of the existence of a claim.”
 17 Yan Suppl. Decl. Ex. 3 at 2-3.

18 Sharp cannot now assert that a small number of documents are insufficient to
 19 warrant inquiry notice when it previously took the opposite position in *LCD*. Sharp should be
 20 estopped from making this argument. *See Baughman v. Walt Disney World Co.*, 685 F.3d 1131,
 21 1133 (9th Cir. 2012) (finding that judicial estoppel prevents a party from changing its position in a
 22 legal proceeding in order “to protect the integrity of the judicial process by ‘prohibiting parties
 23 from deliberately changing positions according to the exigencies of the moment,’” *citing New*
 24 *Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)).

25 **E. Sharp’s Assertion That Sharp Corporation Is A Separate, Non-Party Entity Is**
 26 **Irrelevant Considering Sharp Had Actual And Constructive Notice Of The**
 27 **Alleged Conspiracy**

28 Sharp repeatedly argues that some of the evidence cited by the Defendants

[REDACTED] and this somehow inoculates Sharp [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] This argument is irrelevant in the analysis of Sharp's actual
4 and constructive knowledge of the facts underlying claims it now asserts. [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11

11 Additionally, [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18

18 Finally, this Court has already found that "Sharp's claims are based partly on its
19 corporate relationship with Sharp Corporation," Dkt. No. 2435 at 8. In the order, this Court held
20 that Sharp's claims were subject to the forum selection clause contained in the Basic Transaction
21 Agreement (the "BTA"), a contract governing transactions between Sharp Corporation and
22 Toshiba Corporation, because Sharp's claims against the Toshiba Defendants were tied to Sharp
23 Corporation's contractual relationship with Toshiba Corporation. *See id.* at 6-7 ("In this case,
24 because any relationship between the Sharp Plaintiffs and Toshiba took place 'as part of the larger
25 contractual relationship' between the two parent companies, the BTA and its forum-selection
26 clause should be read to apply to the subsidiaries.").

1 For these reasons, Sharp's attempt to deny knowledge of the alleged conspiracy by
 2 distinguishing itself from Sharp Corporation fails.

3 **F. Sharp Has Refused To Provide A Key Witness Regarding Exhibit 3620**

4 Sharp argues that [REDACTED] did not place it on inquiry notice of a CRT
 5 conspiracy. *See* Sharp Opp. at 11-12. Sharp is wrong; the documents cited by the Defendants'
 6 establish Sharp's corporate knowledge sufficient to arouse an inquiry in a reasonable person;
 7 moreover, Sharp fails to mention that they have refused to produce for deposition a key witness.

8 Sharp claims that the [REDACTED] —
 9 Toshihito Nakanishi — [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED] Because [REDACTED]
 25 [REDACTED] his remaining testimony as to how the
 26 document was interpreted at Sharp, has no evidentiary value – it is merely speculative. *See, e.g.,*
 27
 28

1 *St. Paul Travelers Companies*, 331 Fed. Appx. at 70 (finding that a lack of recollection is not
 2 sufficient to raise a genuine issue of material fact.).

3 Importantly [REDACTED]

4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED], Sharp has refused to
 8 produce [REDACTED] for deposition. [REDACTED]

9 [REDACTED] And he will not be at trial.

10 Sharp's statement that Mr. Nakanishi is "the only witness with any knowledge of
 11 the document" simply ignores Mr. Harada — at the time *the President of Plaintiff SEMA*. That the
 12 president of SEMA (1) received information that two of its suppliers were possibly "conspiring,"
 13 and (2) SEMA took actions in response to this information, *i.e.*, it decided to "concentrate
 14 purchase orders" to a different supplier, evince facts that would "excite the inquiry of a reasonable
 15 person." *Conmar Corp.*, 858 F.2d at 504.

17 **G. Exhibits 3621 And 3622 Show Sharp's Constructive Knowledge Of Alleged**
 18 **Conspiratorial Behavior**

19 Sharp argues that [REDACTED] did not put them on notice of the alleged
 20 conspiracy because [REDACTED]
 21 [REDACTED]. *See* Sharp Opp. at 7-8, 13-14. Sharp's
 22 assertion fails on both fronts.

23 As to Sharp's assertion that [REDACTED], constructive
 24 knowledge can be attributed to Sharp based on several evidentiary factors. First, [REDACTED]
 25

26
 27 ² [REDACTED]
 28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 Second, [REDACTED]

9 [REDACTED] See Defs. Mot. at 15-16. Sharp has repeatedly asserted in
10 this litigation that Sharp in NAFTA is SEC and SEMA.

11 Finally, Sharp is the “wholly owned U.S. sales and marketing subsidiary of Osaka-
12 based Sharp Corporation.” Sharp Second Amended Complaint ¶ 20, whose claims in this case
13 have been found to be based “partly on its corporate relationship with Sharp Corporation.” Dkt.
14 No. 2435 at 8.

15 Based on these factors, the only reasonable inference is that Sharp had constructive
16 knowledge of the U.S.-related information contained in Exhibits 3621 and 3622. See *Caliber One*
17 *Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1085 (9th Cir. 2007) (holding that
18 “[s]ummary judgment is appropriate where . . . the undisputed evidence supports only one
19 reasonable inference”) (citation omitted); *Braxton–Secret v. A.H. Robins Co.*, 769 F.2d 528, 531
20 (9th Cir. 1985) (holding that when the “palpable facts are substantially undisputed” as to “whether
21 a party knew or should have known of a particular condition,” that “such issues can become
22 questions of law which may be properly decided by summary judgment.”) (citations omitted).

23 Remarkably, Sharp also denies that [REDACTED] put it on inquiry notice
24 because [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 Sharp Opp. at 13 (emphasis added). Displaying additional duplicity, Sharp has characterized the
 3 very same information as a [REDACTED]
 4 [REDACTED]
 5 [REDACTED]

6 [REDACTED] Defs. Mot. at 15. Again, Sharp cannot have it both ways. Either it
 7 must concede that the information in these documents is public and thus not evidence of
 8 competitor communications, or Sharp's possession of this information puts it on notice that [REDACTED]
 9 [REDACTED]

10 Sharp's claim that the SDI document containing substantially similar information
 11 as Exhibits 3621 and 3622 is "direct evidence of conspiratorial activity" (Sharp Opp. at 14)
 12 directly contradicts Sharp's position on the document. Even if the SDI document includes
 13 "Matsushita" as its source, based on Sharp's assertion that [REDACTED]
 14 [REDACTED], any exchange of such information between any
 15 CRT supplier would be an exchange of publicly available information, not "direct evidence of
 16 conspiratorial conduct." *See, e.g., Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563,
 17 582-83 (1925) (stating that information exchanges among competitors can be beneficial when they
 18 permit companies to "avoid the waste which inevitably attends the unintelligent conduct of
 19 economic enterprise" and that "[c]ompetition does not become less free merely because the
 20 conduct of commercial operations becomes more intelligent through the free distribution of
 21 knowledge of all the essential factors entering into the commercial transaction.").

24 **III. CONCLUSION**

25 For all of these reasons, and those set forth in Defendants' moving brief,
 26 Defendants respectfully request that the Court grant Defendants' motion and award partial
 27 summary judgment in favor of the Defendants as to Dell's and Sharp's Sherman Act claims
 28 relating to conduct before November 2003.

1 Respectfully submitted: January 23, 2015

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